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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 489

GOVERNOR LURLEEN BURNS WALLACE, in her capacity as Governor of the State of Alabama, and as President of Alabama State School Board of Education; ALABAMA STATE BOARD OF EDUCATION; ERNEST STONE, Secretary and Executive Officer of Alabama State Board of Education; JAMES D. NETTLES, ED DANNELLY, MRS. CARL STRANG, FRED L. MERRELL, W. M. BECK, VICTOR P. POOLE, W. C. DAVIS, CECIL WARD and HAROLD C. MARTIN, as members of Alabama State Board of Education,

Appellants,

—v.—

ANTHONY T. LEE and HENRY A. LEE, by Detroit Lee and Hattie M. Lee, their parents and next friends; PALMER SULLINS, JR., ALAN D. SULLINS and MARSHA MARIE SULLINS, by Palmer Sullins and Della D. Sullins, their parents and next friends; GERALD WARREN BILLES and HELOISE ELAINE BILLES, by I. V. Billes, their father and next friend; WILLIE M. JACKSON, JR., by Mabel H. Jackson, his mother and next friend; WILLIE B. WYATT, JR., and BRENDA J. WYATT, by Willie B. Wyatt and Thelma A. Wyatt, their parents and next friends; NELSON N. BOGGAN, JR., by Nelson Boggan, Sr., and Mamie Boggan, his parents and next friends; WILLIE C. JOHNSON, JR., BRENDA FAYE JOHNSON and DWIGHT W. JOHNSON, by Willie C. Johnson and Ruth Johnson, their parents and next friends, and WILLIAM H. MOORE and EDWINA M. MOORE, by L. James Moore and Edna M. Moore, their parents and next friends,

and

UNITED STATES OF AMERICA,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees Anthony T. Lee *et al.*[1] respectfully move the Court, pursuant to Rule 16(1)(c) of the Rules of the Court, to affirm the judgment below, and in support thereof would show that plenary consideration of this appeal is unnecessary because the decision below is clearly correct.

Citations to Opinions Below

The decision below is reported at 267 F. Supp. 458 (M. D. Ala. 1967). An earlier, highly relevant decision of the court below in this case is reported at 231 F. Supp. 743 (M. D. Ala. 1964).

Jurisdiction

Jurisdiction of this appeal is founded upon 28 U. S. C. §1253, in that injunctive relief was sought and obtained from a three-judge district court constituted pursuant to 28 U. S. C. §§2281, 2284 against the enforcement of a statute of the State of Alabama on the ground of its federal unconstitutionality.

Question Presented

Did the court below abuse its discretion in requiring appellants to exercise their power over public education in Alabama in such a way as to implement, rather than defeat, the school desegregation decisions of this Court?

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[1] Appellees Lee *et al.* are the original plaintiffs in this case. On behalf of the class of all Negro schoolchildren in Alabama, they filed the supplemental complaint and motion requesting the court below to order the state-wide desegregation plan in issue here (see 267 F. Supp. 458, 461-62). Thus they clearly are appellees here, despite unfounded assertions to the contrary by appellants in their jurisdictional statement (see pp. 7-8, 14, 45). In the in-

Statement of the Case

This case originated in January, 1963 as a simple school desegregation case brought by the appellees, Negro children and their parents residing in Macon County, Alabama.[2] After hearing, the district judge ordered the defendant school board to begin desegregation of the county school system by September, 1963. *Lee* v. *Macon County Board of Education,* 221 F. Supp. 297 (M. D. Ala. 1963). In compliance with that order, the defendant school board assigned 13 Negro students to a white high school. On September 2, 1963, these Negro pupils were denied entrance to the white high school by Alabama state troopers acting pursuant to an executive order of Governor George C. Wallace (see 231 F. Supp. at 747). Subsequently, on September 9, 1963, state troopers again prevented entrance of the Negro pupils to the white high school—again upon the order of Governor Wallace (ibid.). The United States then applied to the district court for injunctive relief against the Governor, which was granted. *United States* v. *Wallace,* 222 F. Supp. 485 (M. D. Ala. 1963).

In January, 1964, the State Board of Education closed the desegregated high school and transferred the Negro students to an all-Negro high school (see 231 F. Supp. at 748). The district court then ordered that the Negro students be admitted to two all-white high schools (ibid.).[3]

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stant appeal, appellees Lee *et al.* have heretofore filed an opposition to appellants' application for a stay pending appeal, *Wallace* v. *Lee,* 387 U. S. 916 (1967).

[2] In July, 1963, the United States was added as a party plaintiff and as amicus curiae.

[3] Official resistance to that order was enjoined in *United States* v. *Rea,* 231 F. Supp. 772 (M. D. Ala. 1964).

In February, 1964, appellees filed a supplemental complaint, adding as defendants the Governor, the Executive Officer and Secretary of the Alabama State Board of Education (also known as, and herein referred to as, the State Superintendent of Education) and the other members of the State Board of Education. In this supplemental complaint appellees requested the district court (1) to enjoin these defendants from operating a dual school system based upon race throughout the State of Alabama; (2) to enter an order requiring state-wide desegregation of public schools in the State of Alabama; (3) to enjoin the use of state funds to perpetuate the dual school system and (4) to enjoin as unconstitutional the tuition grant law of 1957 (Code of Ala., Title 52 §§61(13)-61(21)). Thereupon the chief judge of the Court of Appeals for the Fifth Circuit, in response to the request of the district judge, constituted a three-judge court pursuant to 28 U. S. C. §§2281, 2284 (231 F. Supp. at 746). The three-judge court continued in effect, pending full hearing and determination, the temporary restraining order issued by the single district judge enjoining the state officials from their various forms of interference with the peaceful and orderly desegregation of the public schools.

After extensive trial and briefing, the court rendered its decision of July 13, 1964, 231 F. Supp. 743. The court found interference by the state officials with local school desegregation—and more. The court found that appellants possessed "general control and supervision over all the public schools in the State of Alabama" and that these powers were exercised to promote and maintain, rather

than to eliminate, segregation (231 F. Supp. at 756).[4] The court directed appellants to recognize that "in the exercise of their general control and supervision over all the public schools in the State of Alabama and particularly in the allocation and distribution of state funds for school operations, they have an affirmative duty to proceed with 'deliberate speed' in bringing about the elimination of racial discrimination in the public schools of this State" (231 F. Supp. at 756). Appellants were ordered "to formulate and place into effect plans designed to make the distribution of public funds to the various schools throughout the State of Alabama only to those schools and school systems that have proceeded with 'deliberate speed' in the desegregation of their schools and school systems as required by *Brown* v. *Board of Education*" (231 F. Supp. 756-57). But the court withheld state-wide desegregation, preferring to rely for a season upon the good faith of appellants (231 F. Supp. at 756):

> For the present time, this Court will proceed upon the assumption that the Governor, the State Superintendent of Education and the State Board of Education will comply in good faith with the injunction of this Court . . . and, through the exercise of considerable judicial restraint, no state-wide desegregation will be ordered at this time.

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[4] The Court found (231 F. Supp. at 750-51):

> The evidence in this case is clear that over the years the State Board of Education and the State Superintendent of Education have established and enforced rules and policies regarding the manner in which the city and county school systems exercise their responsibilities under state law. This control relates, among other things, to finances, accounting practices, textbooks, transportation, school construction, and even Bible reading.

Appellants were ordered to desist from interfering with local desegregation attempts "—either directly or indirectly —through the use of subtle coercion or outright interference" (231 F. Supp. at 756). Moreover, appellants were enjoined from (order of July 13, 1964, paragraph 6):

> Failing, in the exercise of its control and supervision over the public schools of the State, to use such control and supervision in such a manner as to promote and encourage the elimination of racial discrimination in the public schools, rather than to prevent and discourage the elimination of such discrimination.

The court also concluded that Alabama's tuition grant law was nothing more than a sham established for the purpose of financing with state funds a white school system in the State of Alabama and enjoined its continued operation (231 F. Supp. at 754).

On September 1, 1965, a new tuition grant statute was approved[5] which was challenged by a supplemental complaint filed by the United States.[6]

On September 2, 1966, Act No. 252, 1966 Special Session, was approved, which purported to nullify the school desegregation efforts by local public school officials pursuant to Title VI of the Civil Rights Act of 1964 and the regulations and guidelines promulgated thereunder by the United States Department of Health, Education and Welfare.[7]

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[5] Code of Ala. Tit. 52, §61(8).

[6] The supplemental complaint was filed in August, 1966 and alleged that the new tuition grant statute was for no purpose other than to perpetuate segregation in the public schools of Alabama.

[7] The Act provided, in relevant part: "Any agreement or assurance of compliance with the guidelines heretofore made or given

In September and November, 1966, appellees filed an additional supplemental complaint and a motion for further relief challenging Act No. 252 and "again asking for a state-wide desegregation order and an injunction against the use of state funds to support a dual school system" (267 F. Supp. at 461-62). Following extensive discovery, trial and briefing, the court rendered its decision on March 22, 1967, 267 F. Supp. 458.

The court's opinion confirmed its earlier findings that the appellants had enormous authority and power over the actual operation of the various local school systems throughout the state. "This conclusion was based on the actual assumption or usurpation of authority by these [appellants] over the local school boards, exemplified by their total control, when they chose to exert it, over the Macon County school system, and also by the general statutory power granted to these various officials to supervise and control the public schools in the State of Alabama" (267 F. Supp. at 462).

The court found from the actions of appellants since July 13, 1964 that its reliance upon the good faith of the appellants had been misplaced (267 F. Supp. at 465): "Not only have these [appellants], through their control and influence over the local school boards, flouted every effort to make the Fourteenth Amendment a meaningful reality to Negro school children in Alabama; they have apparently dedicated themselves and, certainly from the evidence in this case, have committed the powers and resources of their

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by a local, county or city board of education is null and void and shall have no binding effect." This Act was struck down in *NAACP* v. *Wallace*, 269 F. Supp. 346 (M. D. Ala. 1967).

offices to the continuation of a dual public school system such as that condemned by *Brown* v. *Board of Education*, 347 U. S. 483."

Therefore, the court concluded that an order granting state-wide desegregation should no longer be withheld (267 F. Supp. at 465):

> Based upon this fact and a continuation of such conduct on the part of these state officials as hereafter outlined, it is now evident that the reasons for this Court's reluctance to grant the relief to which these plaintiffs were clearly entitled over two years ago are no longer valid.

The court set forth in its opinion striking examples of appellants' actions constituting "dramatic interference with local efforts to desegregate public schools" (267 F. Supp. 462-470). But, the court concluded, "the most significant action by these [appellant] state officials, designed to maintain the dual public school system based upon race, is found in the day-to-day performance of their duties in the general supervision and operation of the system" (267 F. Supp. at 470). The court then summarized the appellants' "wide range of activities to maintain segregated public education throughout the State of Alabama" (267 F. Supp. 470-78). "These activities have been concerned with and have controlled virtually every aspect of public education in the state, including site selection, construction, consolidation, assignment of teachers, allocation of funds, transportation, vocational education and the assignment of students" (267 F. Supp. at 478).

Because it could "conceive of no other effective way to give the [appellees] the relief to which they are entitled

under the evidence in this case" (267 F. Supp. at 478), the court ordered a uniform state-wide plan for school desegregation.

The court also enjoined the 1965 version of the Alabama tuition grant statute,[8] finding that "[i]t is clear that the present tuition statute was born of the same effort to discriminate against Negroes, and was designed to fill the vacuum left by this Court's injunction against the 1957 tuition statute" (267 F. Supp. at 477).[9]

On May 22, 1967, this Court denied a stay of the district court's injunction, *Wallace* v. *Lee*, 387 U. S. 916.

ARGUMENT

The Court Below Was Clearly Correct in Ordering the Appellants to Implement the School Desegregation Decisions of This Court.

The court below correctly concluded that this Court's school desegregation decisions[10] would continue to have little

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[8] Code of Alabama, Title 52, §61(8) (Act No. 687, approved September 1, 1965).

[9] On August 31, 1967, appellant Wallace approved a new tuition grant statute to fill the vacuum left by the court's injunction in issue here (Act No. 266).

[10] See, e.g., *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Brown* v. *Board of Education*, 349 U. S. 294 (1955); *Cooper* v. *Aaron*, 358 U. S. 1 (1958); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E. D. La. 1961), aff'd, 368 U. S. 515 (1962); *Griffin* v. *County School Board of Prince Edward County*, 377 U. S. 218 (1964); *Bradley* v. *School Board of Richmond*, 382 U. S. 103 (1965). See also *Evans* v. *Ennis*, 281 F. 2d 385 (3rd Cir. 1960), cert. den. 364 U. S. 933 (1961).

meaning and effect in Alabama[11] unless appellants were ordered to apply the same ingenuity, effort and resources to eradicate the dual school system in Alabama that they had applied to create and maintain it. The court correctly appraised appellants' power over public education in Alabama and fashioned a remedy adequate to reverse the thrust of that power, requiring appellants to promote desegregation rather than fight a rearguard action against it.

A. *The Court Below Correctly Appraised Appellants' Power Over Public Education in Alabama and Correctly Found That That Power Had Been Exercised to Thwart Rather Than to Promote Desegregation.*

"To maintain the racial characteristics of the Alabama public school system, the [appellant] state officials have used their power in essentially two ways. First, they have used their authority as a threat and as a means of punishment to prevent local school officials from fulfilling their constitutional obligation to desegregate schools, and, second, they have performed their own functions in such a way as to maintain and preserve the racial characteristics of the system" (267 F. Supp. at 466).

The evidence as to appellants' interference with local desegregation attempts is overwhelming. The record is replete with outrageous examples of "dramatic interference with local efforts to desegregate public schools" (267 F. Supp. at 470); a few are detailed in the court's opinion, 267 F. Supp. 462-70. They reveal persistent pressure on

[11] The extent of school desegregation in Alabama has been pitifully small. In the Fall of 1966, 95% of the state's Negro pupils were attending *totally* segregated schools. *Report of the United States Commission on Civil Rights, Southern School Desegregation,* 1966-67, pp. 8-11.

local school officials to maintain segregation, including threats to cut off state funds (see, e.g., Plaintiff's Exhibit 11),[12] to use the state police power (see 267 F. Supp. at 469) and to expose local officials to public hostility (see Transcript, pp. 61-62) and demands that the local officials resist "illegal" desegregation, that is, desegregation beyond the *minimum* requirements of the federal courts (see 267 F. Supp. at 467-68; see also Government's Exhibits 6-11, 94; Transcript, p. 33). Local officials who avoided desegregation were rewarded with additional state funds (see 267 F. Supp. at 469-70; Government's Exhibits 95-97; Defendants' Exhibit 5).

But, the court found, "the most significant action by these [appellant] state officials, designed to maintain the dual public school system based upon race, is found in the day-to-day performance of their duties in the general supervision and operation of the system" (267 F. Supp. at 470). "These activities have been concerned with and have controlled virtually every aspect of public education in the state, including site selection, construction, consolidation [see 267 F. Supp. at 470-72], assignment of teachers [see 267 F. Supp. at 472-73], allocation of founds [see 267 F. Supp. at 469-70], transportation [see 267 F. Supp. at 473-74], vocational education [see 267 F. Supp. at 474-75], and the assignment of students" (267 F. Supp. at 478).

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[12] Subsequent to the court's decision, on September 1, 1967, appellant Wallace approved an Act (No. 285) requiring all students to designate the race of their teacher and providing for the cut-off of state funds to local school boards which did not require and enforce those designations. On application by appellees, the three-judge court below issued a temporary restraining order against the Act's enforcement on September 5, 1967.

B. *The Relief Fashioned by the Court Below Represents a Measured and Carefully Considered Judicial Response to Years of Foot-Dragging and Defiance by State Officials Responsible for School Desegregation in Alabama.*

The court below acted on the principle that the equitable remedy must be coextensive with the wrong suffered by appellees and members of their class. Having examined the wide range of appellants' activities, see Part A, *supra*, the court decided that "[t]he remedy to which these [appellees] are constitutionally entitled must be designed to reach the limits of the [appellants'] activities in these several areas and must be designed to require the [appellants] to do what they have been unwilling to do on their own—to discharge their constitutional obligation to disestablish in each of the local county and city school systems in Alabama that are not already operating under a United States court order, the dual public school system to the extent that it is based upon race or color" (267 F. Supp. at 478). The court's decree does just that (see 267 F. Supp. at 480-91).

Preliminarily, it should be noted that the decree is directed specifically and solely to the appellant state officials, and *not* to local school boards. All the decree requires is that the appellants use *their* undoubted power to implement a state-wide desegregation plan.[13]

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[13] Appellants see a due process violation in the fact that the local school boards were not made formal parties to the suit. This contention was effectively dealt with by the court below (267 F. Supp. at 479):

> The argument that this Court is proceeding without jurisdiction over indispensable parties to this litigation, to-wit, local school boards throughout the state, is not persuasive. We are dealing here with state officials, and all we require at

The decree requires the appellants to exercise their clearly established powers, which heretofore have been used to frustrate desegregation, to effectuate the disestablishment of the dual school system in Alabama by taking the following actions (267 F. Supp. at 480-91):

1. To require that all local school boards not under court desegregation order adopt uniform plans for desegregation that meet minimum constitutional standards;

2. To plan school construction and consolidation so as to promote desegregation;

3. To encourage and assist faculty desegregation;

4. To exercise their supervision over proposed school bus routes so as to eliminate race as a basis for assigning students to school buses and to eliminate overlapping and duplicative bus routes based upon race;

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this time is that those officials affirmatively exercise their control and authority to implement a plan on a state-wide basis designed to insure a reasonable attainment of equal educational opportunities for all children in the state regardless of their race. It may be that in some instances a particular school district will need to be brought directly into the litigation to insure that the defendant state officials have implemented this Court's decree and that the state is not supporting, financially or otherwise, a local system that is being operated on an unconstitutional basis. Hopefully, these instances will be the exception and not the rule. Clearly this possibility does not diminish the propriety of the state-wide relief to be ordered. Having already resolved this issue of state-wide relief against the defendants in the order made and entered in Lee, et al. (United States of America, Amicus Curiae) v. Macon County Board of Education, July 13, 1964, 231 F. Supp. 743, further discussion and analysis is not necessary.

5. To terminate all forms of segregation and discrimination in all educational institutions under the direct control of the State Board of Education, including trade schools, junior colleges and state colleges;

6. To formulate a detailed program for equalizing Negro schools with white schools;

7. To refrain from interfering with local officials in their attempt to eliminate the dual school system; and,

8. To submit periodic detailed reports of their progress to the court and to the parties.

Appellants urge the court to note probable jurisdiction to eliminate "the chaos now existing in the field of public education" (Jurisdictional Statement, p. 59). Any chaos which may exist in public education in Alabama is of the appellants' own making. It is they who have employed every resource at their command to circumvent, and sometimes defy, the school desegregation decisions of this Court. When the appellants abandon the segregation policies which they have imposed upon the State of Alabama, then local school officials will "be able to return to the teaching of students and dealing with the related educational problems rather than expending their time and energies trying to tread the difficult 'middle ground' between conflicting federal and state demands" (267 F. Supp. at 478-79). To hasten that day, the decision below should be affirmed.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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